

DIAMOND RAISINS,

Appellant

Representing the Appellant:

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AGBCA No. 2005-139-1

RULING ON GOVERNMENT'S MOTION TO DISMISS

May 11, 2005

BEFORE POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion by Administrative Judge POLLACK.

On or about February 22, 2005, Star Raisins (Star) and Diamond Raisins (Diamond) of Selma, California, were deemed non-responsible bidders and were advised that Agricultural Marketing Service (AMS) considered them affiliates of Lion Raisins, a firm suspended by AMS, U. S. Department of Agriculture, Washington, D.C. AMS extended the suspension of Lion Raisins to Star and Diamond on the basis that the two firms were affiliates of Lion. Star and Diamond were given the opportunity to respond and to contest the intended suspension of their contracting rights either directly to the Suspending Official, Kenneth C. Clayton, or to the Agriculture Board of Contract Appeals (Board). The Board has jurisdiction to hear and make determinations regarding debarment and suspension actions under 7 CFR 24.4 (c)(1).

Appellant filed a timely appeal to the proposed suspension by letter dated March 15, 2005. In it Appellant contested the finding of AMS that Diamond was an affiliate of Lion Raisins. The Board docketed the matter on March 16.

On May 3, 2005, AMS filed a Motion to Dismiss the appeal of the suspension of Diamond Raisins. The motion does not involve Star Raisins. The basis of the Motion is that the entity suspended by AMS, Diamond Raisins, has ceased to exist. AMS points out that the entity suspended as an affiliate of Lion Raisins was a sole proprietorship. The proprietor was Dan Lion. On August 9, 2004, Dan Lion had filed a "Fictitious Business Name Statement" with the Fresno, California county clerk to conduct business in his individual capacity under the name of Diamond Raisins. Thereafter, on March 4, 2005, Dan Lion filed another "Fictitious Business Name Statement" to conduct business in his individual capacity under the name Diamond Raisins. The difference between this filing and the earlier filing was that the latter showed a different address.

On April 15, 2005, Dan Lion filed a "Statement of Abandonment From Use of Fictitious Business Name" with the Fresno county clerk. The business name being abandoned was the name Diamond Raisins. The statement was signed by Dan Lion, the individual conducting business as Diamond Raisins at that time. On April 27, 2005, Dan Lion filed a second "Statement of Abandonment From Use of Fictitious Business Name" and once again abandoned the business name of Diamond Raisins. Again the difference between the filings was the later showed a different address than the first filing.

As a result of the above filings, Dan Lion d/b/a Diamond Raisins ceased to exist as a business entity. Accordingly, the Respondent asks that the motion be granted and states that lifting the suspension from this defunct business would provide no relief whatsoever for Appellant, which by virtue of its defunct status, is no longer capable of doing business with the federal government. Respondent calls the appeal moot and asked that it be dismissed.

In general, counsel for Appellant does not contest the above facts and does not dispute that the entity Dan Lion d/b/a Diamond Raisins no longer exists. Counsel for the Appellant does not oppose the motion.

On April 28, 2005, Brian C. Leighton (who appears in this matter as counsel for Diamond), as an individual, filed a "Fictitious Business Name Statement" with the Fresno county clerk to conduct business in his individual capacity as Diamond Raisins. The fictitious business name of Diamond Raisins had been legally abandoned by Dan Lion in his filing of April 27, 2005, and thus the name Diamond Raisins was legally available for taking by another after April 27. The current entity, Brian C. Leighton d/b/a Diamond Raisins is a separate legal entity from the subject of this decision on the motion. Our action in this motion has no effect upon Brian C. Leighton, d/b/a Diamond Raisins, which is not under a suspension or debarment proceeding.

The purpose of this appeal was to determine if the suspension of Dan Lion d/b/a Diamond Raisins should be lifted or remain in effect. Since Dan Lion d/b/a Diamond Raisins no longer exists as an entity doing business with the government, any decision we would enter would be moot. Accordingly, because the subject of the suspension is no longer in operation, we grant AMS's motion to dismiss and as such do not disturb the suspension of Dan Lion d/b/a Diamond Raisins.

RULING

The Government's Motion to Dismiss is granted.

HOWARD A. POLLACK
Administrative Judge

Concurring:

JOSEPH A. VERGILIO
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
May 11, 2005